UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DOUGLAS AND FAITH HALLOWELL,	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil No. 97-181-B**
	)	
WAL-MART STORES AND FEDDERS, INC.,	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

Presently before the Court are Defendants' Motion to Stay or Dismiss this Action and to Compel Arbitration, Plaintiffs' Response and Defendants' Reply. At the request of the Court, the parties have also filed briefs addressing whether this Court has the authority to compel the parties to arbitration. After reviewing the record, and for the reasons explained below, the Court is satisfied that Defendants may seek a determination regarding the binding effect of the arbitration agreement only by filing a separate cause of action, or by asserting a counterclaim to enforce the agreement.[1] The Court ORDERS that the parties contact the Court to discuss the status of this matter no later March 15, 1999. The

[1] If Defendants choose to assert a counterclaim they must seek leave from the Court to amend their answer pursuant to Fed R. Civ. P. 15(a).

Court will continue to STAY the matter until that time.

Factual and Procedural Background

Plaintiffs filed a complaint against Defendants, Wal-Mart and Fedders, alleging that an air conditioner manufactured by Fedders and sold by Wal-Mart produced a noxious gas, causing Plaintiff Douglas Hallowell personal injury. After Defendants filed their answer and the Court issued a scheduling order, the parties advised the Court that they agreed to enter into binding arbitration. On June 15, 1998, the Court issued an order granting Plaintiffs' motion to continue the trial. In the months following the Court's order counsel for both parties signed an agreement to submit the case to binding arbitration.

An uneasy silence remained on the docket until October 7, 1998, when Plaintiffs filed a motion to return the matter to the trial schedule. The following week the Court granted Plaintiffs' motion in its report of conference of counsel. In November, Defendants filed a motion to stay or dismiss this action and to compel Plaintiffs to arbitration, which is the motion presently under consideration. Following a review of Defendants' motion and the parties' responsive pleadings, the Court ordered the parties to simultaneously submit briefs on whether this Court has the authority, in this products liability action, to determine whether an arbitration agreement signed after Plaintiffs filed the action, is enforceable.

Discussion

In their briefs, both parties argue that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14, requires this Court to hear and resolve whether a binding arbitration agreement exists. Specifically, both parties point to section 2 of the FAA as granting authority to this Court to rule on the agreement. Section 2 of the FAA reads:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, *or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (emphasis added).

9 U.S.C. § 2. Of particular relevance to this matter is the phrase italicized above. The parties argue that the phrase "or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract" clearly empowers this Court to determine if a binding arbitration agreement exists in this case. While it is clear that an agreement to submit an "existing controversy" to arbitration may fall under the scope of the FAA, it only does so if the "controversy" in question arises out of "such a contract" as described in Section 2.

The words "such a contract" refer to the type of contract covered by this Section, namely, "a contract evidencing a transaction involving commerce." Therefore, for section 2 to be applicable in this matter the Court must determine whether the "controversy" in this case arises out of a "contract evidencing a transaction involving commerce."

After reviewing Plaintiffs' action, the Court is satisfied that this controversy does not arise out of a contract of any type. This fact is plain upon reviewing Plaintiffs' complaint. Plaintiffs legal claims against Defendants are based on strict products liability, negligence, and breach of express and implied warranties, all of which are tort claims. Plaintiffs did not bring suit based upon any legal theory that a contract existed between the parties nor did Defendants assert that a contract existed between the parties in their answer.[2] As a result, because this controversy does not arise out of a contract, the Court is satisfied that the provisions of the FAA are inapplicable to this matter. If the Defendants elect to seek enforcement of this agreement they can do so only by filing a separate cause of action or by seeking leave from this Court to amend their answer under Fed. R. Civ. P. 15(a) to a file permissive counterclaim under Fed R. Civ. P. 13. Of course, this Court still

[2] Of course, had the parties entered into a contract that contained an arbitration clause at the time of purchase, this action would have fallen under the FAA and this Court would be required to compel the parties to arbitration.

has authority over the underlying dispute and is prepared to adjudicate that dispute pending resolution of the parties' disagreement over whether to enter into arbitration. Accordingly, this Court will continue to STAY this matter until March 15, 1999, and ORDERS the parties to contact the Court to discuss the status of this matter by March 15, 1999. Further, Defendants' Motion to Compel the Parties to Arbitration is hereby DENIED.

Conclusion

For the reasons delineated above the Court STAYS[3] this matter and ORDERS the parties to contact the Court no later than March 15, 1999. The Court DENIES that part of Defendants' motion to compel the parties to arbitration.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on March 3, 2000.

[3] The Court is not staying pursuant to section 4 of the FAA. Instead, this Court stays this matter utilizing the Court's discretion to manage it own docket, *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 879 (1st Cir. 1977).